Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK J. SCHIFFNER,

Petitioner,

v.

MOTOROLA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR A WRIT OF CERTIORARI

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Petitioner's valid causes of action setting forth compensatory damages were dismissed as preempted by a ruling that could not occur if this Court's preemption rulings were followed. The Illinois Courts should not be allowed to disregard the rulings of this Court on preemption, thus denying all who would rely upon the Illinois Courts the benefit of those rulings, contrary to that which is available in other states and jurisdictions.

QUESTIONS PRESENTED

Whether the Illinois Courts erred in holding, in conflict with this Court, other courts of appeal and other state courts construing identical preemptive language, that the statutory language of the Electronic Products Radiation Control Act, 21 U.S.C. § 360kk *et seq.* preempts Petitioner's state law causes of action?

Does the mere existence of a general empowerment clause in the Electronic Products Radiation Control Act, 21 U.S.C. § 360kk *et seq.* negate the Act's preemption clause which preserves non-conflicting state laws?

Are there different preemption rules depending on whether the compensable injury is personal injury or economic injury?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Frank J. Schiffner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court for the First District, Sixth Division entered in this cause on June 30, 1998.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District, Sixth Division is reported at 297 Ill. App. 3d 1099 (1st Dist. 1998). It is reprinted at page 1 of the Appendix ("App.").

The order of the Illinois Supreme Court denying the Petition for Leave to Appeal has not been reported. It is reprinted at App. at 18.

JURISDICTION

Petitioner filed his Fourth Amended Class Action Complaint ("Complaint") in Illinois state court raising various state law causes of action. On June 16, 1997, the Circuit Court of Cook County dismissed the case because, in that Court's opinion, the causes of action were preempted by the Electronic Products Radiation Control Act, 21 U.S.C. §360kk *et seq.* ("EPRCA") and the pleading failed to allege compensable damages.

On Petitioner's appeal, the Appellate Court, on June 30, 1998, found that the Complaint did state a claim for compensable damages under Illinois law. The Appellate Court, however, held that the causes of action were preempted by the EPRCA.

Petitioner filed a petition for leave to appeal to the Illinois Supreme Court. On October 6, 1998, the Illinois Supreme Court denied Petitioner's petition.

The jurisdiction of this Court to review the judgment of the Appellate Court of Illinois is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

21 U.S.C. §360ss

Whenever any standard prescribed pursuant to §360kk of this title with respect to an aspect of performance of an electronic product is in effect, no state . . . shall have any authority either to establish, or continue in effect, any standard which is applicable to the same aspect of performance of such product and which is not identical to the federal standard. . . .

21 U.S.C. § 360pp(f)

The remedies provided by this part shall be in addition to and not in substitution for any other remedies provided by law.

STATEMENT OF THE CASE

On June 16, 1997, the Circuit Court of Cook County dismissed Petitioner's Complaint finding that Petitioner's causes of action were preempted by the Electronic Product Radiation Control Act ("EPRCA"), 21 U.S.C. §360kk *et seq.* The trial court further found that Petitioner failed to state a cause of action because he did not allege suffering any compensable injury.

Petitioner timely filed a notice of appeal from the ruling of the trial court. The Appellate Court, after briefing and argument, issued an opinion on June 30, 1998. App. at 1. The Appellate Court held that Petitioner did, in fact, allege compensable injuries in his Complaint. However, the Appellate Court affirmed the trial court's finding that the claims, though validly stated, were preempted by the EPRCA. On July 16, 1998, Petitioner timely filed a petition for leave to appeal. On October 6, 1998, the Illinois Supreme Court denied Petitioner's petition for leave to appeal. App. at 18.

Petitioner purchased a new cellular portable telephone manufactured by Defendant. Petitioner became concerned with various aspects of his purchase and, on July 30, 1994, wrote to Defendant complaining of the transaction and asking that Defendant respond to his concerns. On March 24, 1997, Petitioner filed his Complaint in this case. The Complaint alleges causes of action sounding in consumer fraud, breach of the implied warranty of merchantability and violation of the Magnuson-Moss Warranty Act.

The bases for these causes of action were that Defendant manufactured and sold portable cellular telephones which were less than the bargained-for value in that they were without adequate information about the health risks, lacked information on the effects of electromagnetic frequencies (EMF) on human cells, without guards to shield the user from EMF radiation, without adequate instructions on how to use the phone (including how to hold the phone so as to reduce exposure from EMF radiation) and without adequate design so as to increase the distance between the user's head and the antenna of the phone.

The trial court dismissed Petitioner's Complaint, finding that it failed to allege compensable injuries. Additionally, the trial court held that Petitioner's claims were preempted by the EPRCA. App. at 2.

The Appellate Court disagreed with the trial court on the issue of compensable damages. The Appellate Court concluded that, in light of Illinois court opinions in *Connick v. Suzuki Motor Company*, 174 Ill. 2d 482 (1996) and *Perona v. Volkswagen of America, Inc.*, 292 Ill. App. 3d 59 (1997), Petitioner had properly pled damages for causes of action sounding in consumer fraud, breach of warranty, and Magnuson-Moss. App. at 14. However, the Appellate Court found that Petitioner's causes of action were preempted by federal law, specifically the EPRCA. App. at 14.

The Appellate Court discussed the standards applicable when reviewing a federal preemption question and noted that federal court decisions controlled over state decisions. App. at 8. However, that Court noted that there were no federal decisions construing the EPRCA. App. at 8.

The preemption language of the EPRCA states in pertinent part:

> Whenever any standard prescribed pursuant to §360 kk of this title with respect to an aspect of performance of an electronic product is in effect, no state . . . shall have any authority either to establish, or continue in effect, any standard which is applicable to the same aspect of performance of such product and which is not identical to the federal standard. . . .

21 U.S.C. §360ss.

The Appellate Court noted that the EPRCA did not expressly preempt Petitioner's claims. App. at 9. Rather, the Court found that preemption was appropriate when there was regulation in such detail to leave no room for state involvement. App. at 9.

Acknowledging that there were no standards for performance set for the applicable product under the EPRCA, the Appellate Court relied upon the proposition that Congress could have intended the agency to regulate and set pervasive national standards, App. at 10, and that the exclusive power to do so was provided in the general empowerment clause of the EPRCA.

The Appellate Court distinguished this Court's recent decision in *Medtronic Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240 (1996), stating that the preemption analysis is different since the plaintiff's state law claims in *Lohr* involved personal injuries. App. at 11.

Finally, the Appellate Court rejected Petitioner's reliance on the savings clause language in the EPRCA relying instead, without justification, on the general statement that a general savings clause is not conclusive and does not rule out implied preemption. App. at 13-14.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS REVIEWED IDENTICAL PREEMPTION LANGUAGE IN OTHER FEDERAL STATUTES AND HELD THAT STATE CLAIMS WERE NOT PREEMPTED.

Petitioner asks this Court to review the judgment of the Appellate Court because it conflicts with rulings of this Court interpreting the preemptive reach of statutory provisions in federal statutes. This Court, and numerous other federal courts, have interpreted both verbatim and similar statutory preemption language from other federal statutes as not preempting state law causes of action. Allowing the Appellate Court's conflicting ruling to stand will create a morass of inconsistent rulings interpreting the same statutory language.

This Court refused to preempt state law causes of action when it construed an identical preemption clause. *See Freightliner v. Myrick*, 514 U.S. 280, 283, 115 S.Ct. 1483, 1485 (1995). In *Myrick,* the National Traffic and Motor Vehicle Safety Act ("Safety Act") provided:

> Whenever a federal motor vehicle safety standard established under this subchapter is in effect, no State . . . shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard.

Id. at 284, 115 S.Ct. at 1486. This language is essentially verbatim to the language of the EPRCA. In

Myrick, the Supreme Court concluded that there was no preemption and that the Safety Act's preemption clause applied only:

> Whenever a federal motor vehicle safety standard . . . is in effect with respect to the same aspect of performance regulated by a state standard. . . .

Id. at 286, 115 S.Ct. at 1487. The Court concluded that because there was no current standard set under the Safety Act:

> There is simply no minimum, objective standard stated at all. Therefore, states remain free to establish or continue in effect their own safety standards concerning those aspects of performance. (emphasis added)

Id.

Thus, this Court has construed identical language to the preemption language at issue in this case and found that where there is no standard in effect, there is no preemption of a state law cause of action, and states remain free to pass any standard in relation to performance that they desire. It would be improper to construe Congressional intent under one statute to be different than Congressional intent under another statute when Congress chose to use the exact preemptive language in both statutes. Moreover, if Congress had intended something other than that which this Court held in *Myrick*, it could have amended both the EPRCA, and the Safety Act, to clarify its intention.

The current Federal Motor Vehicle Safety Act ("FMVSA") preemption provisions are now contained at

49 U.S.C. §30103. These provisions are similar in language, and identical in meaning, to the language construed by the Supreme Court in *Myrick*. Numerous federal and state courts have found that this language does not preempt state law causes of action. *See Henry Ford Motor Company Bronco II Products Liability Litigation*, 909 F.Supp. 400 (E.D. La. 1995); *Brewer v. General Motors*, 926 S.W. 2d 774 (Tx.Ct. App. 1996); *Tebbetts v. Ford Motor Company*, 140 N.H. 203, 665 A.2d 345 (N.H. 1995), *cert. denied*, 516 U.S. 1072, 116 S.Ct. 773 (1995); *Wilson v. Pleasant Cong.*, 660 N.E.2d 327 (Ind. 1995).

While the Appellate Court ruling is inconsistent with this Court's ruling in *Myrick*, it also implicates the construction of other federal statutes. Both the Flammable Fabrics Act, 15 U.S.C. §1203, and the Manufactured Home Construction and Safety Standards Act, 42 U.S.C. §5403(d), contain identical preemption clauses. Cases interpreting those statutes have upheld state law claims. *See Wilson v. Bradlees of New England, Inc.*, 96 F.3d 552, *cert. den.*, 117 S.Ct. 1083 (1996). Allowing a ruling upholding the preemption of these causes of action will lead to the obliteration of the rules this Court has brought to preemption analysis. The Illinois ruling is a ruling against the preemption rulings of this Court with decisive and national impact. This Court should grant certiorari to review this matter. Alternatively, this Court should exercise its supervisory authority and reverse the rulings of the Illinois Courts.

II.

ANALYSIS OF THE PREEMPTION LANGUAGE OF THE EPRCA REVEALS NO CONGRESSIONAL INTENT TO PREEMPT STATE LAWS WHICH DO NOT CONFLICT WITH A FEDERAL STANDARD.

In determining whether a federal statute preempts state law causes of action, a court must attempt to discern Congressional intent, and preemption is appropriate only if it is the clear and manifest purpose of Congress. *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 252, 114 S.Ct. 2239 (1994); *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345, 114 S.Ct. 843 (1994). There is a strong presumption against preemption, particularly where a party is deprived of all judicial remedies. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 104 S.Ct. 615 (1984). Preemption of state law by federal statute or regulation is not favored and is limited to situations where state law claims interfere with or are contrary to federal law. *Chicago Northwestern Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130 (1981). The intention of Congress to preempt state law may be manifested by express provision, implication, or by a conflict between federal and state law. *New York Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654, 115 S.Ct. 1671, 1676 (1995).

It is indisputable that the EPRCA does not expressly preempt Petitioner's claims here. App. at 9. *See* §360ss. Further, as demonstrated herein, Petitioner's causes of action are not impliedly preempted, nor did Congress intend to so exhaustively regulate the field that there is no room left for state regulation. Finally, enforcement of the state law claims will not conflict with the nonexistent regulatory scheme of the FDA.

A. FEDERAL REGULATION OF PRODUCTS EMITTING RADIATION IS NOT EXCLUSIVE.

The preemption language of the EPRCA provides:

> Whenever any standard prescribed pursuant to §360kk of this title with respect to an aspect of performance of an electronic product is in effect, no state . . . shall have any authority either to establish, or continue in effect, any standard which is applicable to the same aspect of performance of such product and which is not identical to the federal standard. . . .

21 U.S.C. §360ss.

A plain and common sense reading of this statute yields but one conclusion. A state may have a standard in effect when there is no federal standard covering an aspect of performance of an electronic product. Otherwise, the language in the statute "or to continue in effect" would be meaningless and contrary to fundamental principles of statutory construction. If Congress had intended to exhaustively regulate the field, prohibiting any state regulation, then not only would the preemption statute simply prohibit any state regulation whatsoever, but it would also preclude a state from ever passing any regulations.

The preemption clause clearly and expressly allows a state to promulgate standards for electronic products, even when a federal standard is in effect under the statute, so long as the state standard is identical to the federal standard. Thus, it is the clear intention of Congress, expressed in the statute, to allow for state regulation. In fact, counsel for Motorola expressly conceded to the Appellate Court, at oral argument, that a state could pass a standard as long as the state standard was

identical to a federal standard in effect. As this Court has repeatedly stated:

> We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.

Cippolone v. Liggett Group, Inc. 505 U.S. 504, 521, 112 S.Ct. 2608, 2620 (1992), *quoting, Shaw v. Delta Air Lines*, 463 U.S. 85, 97, 103 S.Ct. 2890, 2900 (1983). Even in light of the broad preemptive reach of the Cigarette Labeling Act, the Court found that some state law actions were not preempted. *Id.* at 523-31.

In order to even trigger any of these preemptive provisions, a federal regulation promulgated under the statute must exist. It is undisputed that no federal regulations have ever been passed covering any of the products at issue here during the relevant periods for Petitioner's Complaint.

B. FEDERAL STATUTES WITH SIMILAR LANGUAGE AND MEANING HAVE BEEN CONSTRUED AGAINST PREEMPTION OF STATE LAW CLAIMS.

The United States Supreme Court and numerous federal courts have construed federal statutory provisions with identical or effectively identical language as concerned here, and found that state law causes of action were not preempted. The Illinois Court's ruling threatens those decisions.

For example, an Environmental Protection Agency statute with similar language was held not to preempt state law claims. *Baltimore and Ohio Railroad v. Oberly*, 837 F.2d. 108 (3rd Cir. 1988). There, the statute provided:

> [N]o state . . . may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility . . . unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

Id. at 113-14.

Additionally, the statutory provisions in the same Food Drug and Cosmetic Act which precede the EPRCA are the Medical Device Amendments ("MDA"), which this Court recently held did not preempt state statutory and common law causes of action. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240 (1996). The preemptive language of the MDA provides:

> No state . . . may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from or in addition to any requirement applicable under this chapter to that device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. §360k(a). There, as the Appellate Court found here, defendants argued implied preemption of any state law claim due to the general empowerment clause of the statute. This Court disagreed. Without an express preemption provision, general preemption does not arise as a result of mere enactment of a statute. "Rather, in most cases, a state law will be preempted only to the extent that the FDA has promulgated a relevant federal 'requirement'." *Id.* at 496, 116 S.Ct. at 2255. This Court concluded that the jurisdiction of the

FDA was not intended to preempt laws of general application, including petitioner's failure to warn claims, manufacturing defect claims, labeling claims or negligent design claims. *Id.* at 500, 116 S.Ct. at 2257-58. *See also*, 49 U.S.C. §30101 (empowerment clause of the Federal Motor Vehicle Safety Act).

While *Lohr* involved personal injuries, the determination of preemption is not framed by the kind of damages claimed by the petitioner, but by the scope and reach of the statute. The petitioner in *Lohr* was entitled to sue for breach of warranty and to receive damages under a traditional contract analysis. If a breach of contract claim is preserved in those cases, there is no basis to find the properly pled claims preempted here solely because no personal injuries are alleged.

C. THERE IS NO IMPLIED PREEMPTION OF THESE CAUSES OF ACTION.

1. The Appellate Court Erred by Implying Preemption From the General Purpose of the Act.

In rejecting the savings clause which explicitly preserves state and common law remedies, the Appellate Court erroneously relied on the general purpose of the EPRCA to imply preemption of Petitioner's claims. App. at 10, 12-13. While the Appellate Court's analysis clearly ignores the express intent of Congress, it fails for additional reasons. By reading the general purpose and empowerment clause of the EPRCA to the exclusion of the preemption and savings clauses, the Appellate Court ignored the instructions set forth by this Court:

> [S]uch an expansive reading of the preemption clause would "read Congress's words of limita-

> tion as a mere sham, and . . . read the presumption against preemption out of the law whenever Congress speaks to the matter with generality."

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, 115 S.Ct. 1671, 1677 (1995).

The Appellate Court's reliance on the decision in *Verb v. Motorola, Inc.*, 284 Ill. App. 3d 460, 469 (1st Dist. 1996), App. at 10, for the proposition that the FDA's power to regulate the subject matter covered in the instant case is exclusive, ignores the plain language of the statute. Nowhere in the empowerment clause, §360kk, or anywhere else in the concerned statute, does Congress state that the FDA has the exclusive power to regulate these areas. In fact, were this the case there would be no need for a preemption clause that preempted only state regulation which was different than a "standard proscribed pursuant to . . . this title. . . ."

Again, reference to the FMVSA is instructive. As noted above, the identical preemptive language did not lead to preemption of state actions where there was no federal standard in effect. In the FMVSA, the Purpose and Policy clause provides that:

> it is necessary—
>
> > (1) to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and
> >
> > (2) to carry out needed safety research and development.

49 U.S.C. §30101.

This empowerment is no different than the empowerment under the EPRCA. Since the Supreme Court and the other federal and state courts have found no basis for implied preemption under the FMVSA, it is improper to import a different, more expansive, intent to Congress in promulgating the EPRCA. *See Myrick,* 514 U.S. at 288-89, 115 S.Ct. at 1488.

2. The Lack of Federal Regulation Does Not Imply An Affirmative Decision That No Regulation is Necessary or Required.

While the Appellate Court did not expressly hold that the FDA's non-regulation or non-issuance of standards constituted an affirmative decision that no standards were necessary, App. at 10, it did discuss the issue and Defendant below raised that argument in support of preemption. This Court has repeatedly held that non-regulation will not rise to the level of an affirmative decision that no regulation is necessary or allowed, in part:

> [B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for the regulations to be exclusive.

Hillsborough County, Florida v. Automated Medical Labs., Inc., 471 U.S. 707, 718, 105 S.Ct. 2371 (1985).

This identical argument was rejected in *Myrick*. 514 U.S. at 286-87, 115 S.Ct. at 1487. In fact, in *Myrick*, there was a federal regulation in effect, but it had been vacated by a federal court decision. *See also, Nat'l*

Kerosene Heater Association v. Massachusetts, 653 F.Supp. 1079 (D. Mass. 1986) (Consumer Product Safety Act preemption is limited to safety standards which are actually set.), *and Richards v. Michelin Tire Corp.*, 786 F. Supp. 959 (S.D. Al. 1992) (NHTSA decision not to impose regulatory standards on mismatched tires does not equal a decision to preempt state regulation.) Similarly, that argument, if raised in opposition to this Petition, must be rejected here.

III.

THE SAVINGS CLAUSE PRESERVES PETITIONER'S CLAIMS.

The EPRCA, as with many federal statutes, contains a savings clause. The clause provides that "[t]he remedies provided for in this part shall be in addition to and not in substitution for any other remedies provided for by law." 21 U.S.C. § 360pp (f). The Appellate Court found that the savings clause was no help to Petitioner because the general empowerment provisions, 21 U.S.C. § 360kk, authorized the FDA to regulate health and safety matters. App. at 13. The Appellate Court relied upon the Illinois Supreme Court decision in *Orman v. Charles Schwab and Co.*, 179 Ill. 2d 282, 293 (1997). *Orman* is factually inapposite.[1]

Giving the savings clause its reasonable and natural meaning, Petitioner's claims are preserved as they do not conflict with any federal standard.

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[1] In fact, *Orman* stands only for the proposition that a savings clause does not protect a state law that actually conflicts with the federal regulatory scheme. Since there are no federal standards in effect, this argument is circular at best.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court grant his Petition for Certiorari to the decision of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX

FRANK J. SCHIFFNER, on Behalf of Himself and All Other Persons Similarly Situated, Plaintiff-Appellant, v. MOTOROLA, INC., Defendant-Appellee.

No. 1-97-2456

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SIXTH DIVISION

297 Ill. App. 3d 1099; 697 N.E.2d 868; 1998 Ill. App. LEXIS 447; 232 Ill. Dec. 126; CCH Prod. Liab. Rep. P15,319

June 30, 1998, Decided

SUBSEQUENT HISTORY: [**1] Released for Publication August 14, 1998.

PRIOR HISTORY: Appeal from the *Circuit Court of Cook County. No. 95 CH 01879.* Honorable Stephen A. Schiller, Judge Presiding.

DISPOSITION: Affirmed.

CORE TERMS: state law, preemption, phone, telephone, cellular, consumer fraud, preempted, preempt, radiation, portable, causes of action, electronic, compensable injury, savings clause, federal law, diminished, breach of warranty, federal preemption, preemption issue, regulation, warning, motion to dismiss, emit, express provision, reinstated, proven, label, breach of implied warranty, failed to provide, merchantability

COUNSEL: For Frank J. Schiffner, APPELLANT: Ben Barnow, Alan M. Goldberg, and Juanita H. Chen, all of Barnow & Goldberg, P.C., and Aron D. Robinson, both of Chicago.

For Motorola, Inc., APPELLEE: Garrett B. Johnson, Brian D. Sieve, and Terrence J. Dee, all of Kirkland & Ellis, of Chicago.

JUDGES: JUSTICE GREIMAN delivered the opinion of the court. ZWICK and QUINN, JJ., concur.

OPINION BY: GREIMAN

OPINION:

[*1100] JUSTICE GREIMAN delivered the opinion of the court:

Plaintiff Frank J. Schiffner appeals the dismissal of his fourth amended complaint against defendant Motorola, Inc., based on defendant's marketing and sale of cellular telephones. The circuit court granted defendant's section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 1996)), finding that federal law preempted plaintiff's state law causes of action pursuant to the decision in *Verb v. Motorola, Inc., 284 Ill. App. 3d 460 (1996),* appeal denied, *172 Ill. 2d 568 (1997).*

The issue on appeal is whether plaintiff's causes of action under state law are preempted by federal law, i.e., the Electronic Product Radiation Control Act (Act) (*21 U.S.C.A. §§ 360hh* through 360ss (West [*1101] Supp. 1998)). The Verb court held that the Act preempted the same causes of action advanced by the instant plaintiff [**2] in his fourth amended complaint. We find the Verb case persuasive and dispositive of this issue. Thus, we affirm the dismissal of plaintiff's complaint.

In addition, however, plaintiff contends that his complaint, unlike the Verb complaint, sufficiently stated a compensable injury by alleging the diminished value of

a product due to defects associated with the product. We agree with plaintiff that such an allegation states a compensable injury.

The procedural background of this case tracks the path of the Verb complaint through the appellate decision in Verb, which was first filed in March 1996 and then, upon the denial of a petition for rehearing, was issued as a modified opinion in November 1996.

In August 1993, the circuit court dismissed the Verb complaint, holding that its subject matter was preempted by federal law and ruling that the Verb plaintiffs had not alleged a compensable injury. The circuit court's ruling was appealed.

In June 1995, the present plaintiff filed a second amended complaint. Defendant filed a motion to dismiss based on the circuit court's previous dismissal of the Verb complaint, which was then pending on appeal.

In March [**3] 1996, the appellate court filed its opinion in Verb and affirmed the dismissal of the Verb complaint. The Verb plaintiffs filed a petition for rehearing with the appellate court.

In response to the March 1996 Verb decision, the present plaintiff sought and received leave to file another amended complaint in June 1996. In September 1996, defendant filed another section 2-615 motion to dismiss plaintiff's third amended complaint or, in the alternative, a stay pending the appellate court's ruling the rehearing petition on Verb. The circuit court granted a stay. In November 1996, the appellate court denied the Verb rehearing petition and filed a modified opinion.

In response to the Verb modified opinion, the circuit court lifted the stay in the present case in February 1997. On February 5, 1997, the circuit court, finding that the Verb opinion was dispositive on the preemption issue and binding on it, dismissed plaintiff's third amended complaint and allowed plaintiff to amend again.

With this background and direct link to Verb, plaintiff then filed his fourth amended complaint, which is at issue in the present appeal. Plaintiff's fourth amended [**4] complaint arises out of the marketing and sale of cellular portable telephones by defendant. Plaintiff alleged three causes of action: (1) breach of implied warranty of merchantability under the Uniform Commercial Code (810 ILCS 5/2-103 et [*1102] seq. (West 1992)); (2) consumer fraud; and (3) violation of the Magnuson-Moss Warranty Act (*15 U.S.C. § 2301* et seq. (1994)). In addition, plaintiff sought certain injunctive relief to stop defendant from continuing its alleged illegal acts and conduct on an ongoing basis as alleged in the complaint.

The gravamen of plaintiff's complaint is that defendant manufactured and sold cellular portable telephones that were defective because of the uncertain safety of the product and defendant's failure to disclose potential health risks and potential hazards associated with the use of the product. Cellular portable phones operate with a transmission antenna that emits the phone's electromagnetic radio waves into the phone unit. Plaintiff further alleges that defendant did not complete studies to definitively and accurately ascertain the safety of the use of the phones and defendant failed to advise plaintiff that the phones had not been proven

[**5] safe. Plaintiff also alleged that defendant failed to adequately package or label the phones; failed to provide adequate information about the health risks; failed to provide adequate guards to shield the user from electromagnetic field (EMF) radiation; failed to provide adequate instructions on how to use the phone; and failed to adequately design the phone.

Defendant again filed a section 2-615 motion to dismiss plaintiff's complaint. The circuit court dismissed plaintiff's fourth amended complaint and, relying on the Verb decision, stated that the grounds for dismissal were preemption and "a lack of cognizable injury."

As a threshold matter, defendant asserts that the principles of stare decisis require this panel, the sixth division of the first district, to follow the precedent established by the second division of the first district in Verb. Defendant's assertion fails for two reasons. First, the doctrine of stare decisis requires courts to follow the decisions of higher courts, but does not bind courts to follow decisions of equal or inferior courts. *Village of Northbrook v. Cannon, 61 Ill. App. 3d 315, 322, 18 Ill. Dec. 572, 377 N.E.2d 1208 (1978).* Second, [**6] "stare decisis is a policy of the courts to stand by precedent and leave settled points of law undisturbed." *Charles v. Seigfried, 165 Ill. 2d 482, 492, 209 Ill. Dec. 226, 651 N.E.2d 154 (1995).* The point of law at issue in the instant case is hardly settled law because, to date, the Verb opinion is the sole decision in the country on federal preemption under the Act. Moreover, a split in authority between the divisions of the first district is not unprecedented and has led to an ultimate resolution by the supreme court. See, e.g., *Moore v. Jackson Park Hospital, 95 Ill. 2d 223, 69 Ill. Dec. 191, 447 N.E.*

2d 408 (1983) (resolving contrary decisions between the fourth division of the first district *(Muller v. Health & Hospital Governing Comm'n, 106 Ill. App. 3d 383, 62 Ill. Dec. 444, 436 N.E.2d 26 (1982))* and the first division of the first district *(Isaacs v. Michael Reese Hospital & Medical Center, 101 Ill. App. 3d 876, 57 Ill. Dec. 261, 428 N.E.2d 941 [*1103] (1981)))*.[1] Thus, we decline defendant's invitation to apply stare decisis to the instant appeal.

[**7] We review de novo the dismissal of a complaint under section 2-615 for failure to state a cause of action upon which relief can be granted. *Vernon v. Schuster, 179 Ill. 2d 338, 344, 228 Ill. Dec. 195, 688 N.E.2d 1172 (1997); Douglas Theater Corp. v. Chicago Title & Trust Co., 288 Ill. App. 3d 880, 883, 224 Ill. Dec. 249, 681 N.E.2d 564 (1997).*

On appeal, plaintiff essentially asserts that the Verb case was wrongly decided and that the Verb opinion failed to address plaintiff's arguments. We disagree.

The principles of federal preemption are well established. The doctrine of preemption is based on the supremacy clause of the United States Constitution, which mandates that "'the Laws of the United States

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[1] While appellate court panels are bound only by higher courts, a circuit court may find it confusing to determine by which appellate court it may be bound. See *Aleckson v. Village of Round Lake Park, 176 Ill. 2d 82, 94, 223 Ill. Dec. 451, 679 N.E.2d 1224 (1997)* (Harrison, J., specially concurring, joined by Heiple, C.J.) (the majority holds that a circuit court is bound by the decisions of the appellate court of the district in which its sits and the special concurrence observes that since there is only one appellate court, a decision by any appellate court is binding on all circuit courts in the state).

*** shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Orman v. Charles Schwab & Co., 179 Ill. 2d 282, 285, 227 Ill. Dec. 927, 688 N.E.2d 620 (1997)* (applied federal preemption), quoting U.S. Const., art. VI, cl. 2; *Stern v. Norwest Mortgage, Inc., 179 Ill. 2d 160, 166, 227 Ill. Dec. 762, 688 N.E.2d 99 (1997)* (rejected federal [**8] preemption).

Congressional intent determines whether a federal statute preempts state law. *Scholtens v. Schneider, 173 Ill. 2d 375, 379, 219 Ill. Dec. 490, 671 N.E.2d 657 (1996)* (no preemption); *Busch v. Graphic Color Corp., 169 Ill. 2d 325, 334, 214 Ill. Dec. 831, 662 N.E.2d 397 (1996)* (and cases cited therein) (preemption applies). "An act of Congress or regulatory law promulgated thereunder may supersede the statutory, regulatory or common law of any state where such '[is] the clear and manifest purpose of Congress.'" *Orman, 179 Ill. 2d at 285,* quoting *Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 120 L. Ed. 2d 407, 422, 112 S. Ct. 2608, 2617 (1992),* quoting *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152 (1947).*

The intent of Congress to preempt state law may be manifested "'by express provision, by implication, or by a conflict between federal and state law.'" *Busch, 169 Ill. 2d at 335,* quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance, [*1104] Co., 514 U.S. 645, 654, 131 L. Ed. 2d 695, 704, 115 S. Ct. 1671, 1676 (1995);* see also *Orman, 179 Ill. 2d at 285* [**9] ("[a] congressional act can either expressly or implicitly preempt a state cause of action"),

citing *Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 392, 115 S. Ct. 1483, 1487 (1995);* see also *Scholtens, 173 Ill. 2d at 379* ("Congress' intent to preempt state law may be explicitly stated in the statute's language or implicitly contained in its structure and purpose"), citing *Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95, 77 L. Ed. 2d 490, 500, 103 S. Ct. 2890, 2900 (1983).*

Notably, decisions of federal courts interpreting a federal act are controlling upon Illinois courts so that a federal act would be given uniform application. *Busch, 169 Ill. 2d at 335.* However, since no federal court has yet construed the preemptive scope of the Act, we can seek no guidance there. In addition, research has revealed that no other state has addressed the issue presented here. Thus, the only court to decide the preemptive effect of the Act is the Verb court.

The Verb court specifically found "that the FDA [Food and Drug Administration] does preempt a state's power over the issues in the case at bar because the FDA directly regulates electronic products [**10] that emit radiation with regard to public health." *Verb, 284 Ill. App. 3d at 468.* The Verb court quoted the Act as the empowering statute.

Factually, the Verb case and the instant case are indistinguishable: (1) the allegations in the complaints are virtually alike for purposes of the preemption issue, albeit not identical for purposes of the damage issue; and (2) the causes of action asserted in the complaints are the same. Regarding the allegations, the Verb court characterized the Verb complaint as follows:

> "In the present case, plaintiffs' complaint *** centered on the lack of warnings as to the safety of and

> possible health risks caused by cellular telephones purchased by them which, the parties agree, emit radiation. More specifically, as stated in plaintiffs' opening brief on appeal, 'This case arises out [of] the Defendants' failure to warn the consuming public, including putative Plaintiffs, of the risks associated with the use of cellular portable telephones and the Defendants' false pronouncements of the phones' "proven" safety, the safety of which has clearly not been proven.' (Emphasis in original.)" *Verb, 284 Ill. App. 3d at 469.*

The [**11] instant complaint can aptly be described in the exact same way. In addition, the causes of action are the same and plaintiff apparently does not contest that fact. The causes of action in each case include breach of implied warranty of merchantability, violation of the Magnuson-Moss Warranty Act and consumer fraud.

As to the legal issue, plaintiff's arguments on appeal as to the [*1105] merits of preemption were addressed by the Verb court. First, plaintiff observes that the Act does not expressly preempt state law claims. Indeed, the Verb court did not find that an express preemption existed in the Act. Rather, the Verb court correctly observed that "Congress can assert exclusive power either by explicit statutory language or by regulating a matter in such detail as to leave no room for state involvement." *Verb, 284 Ill. App. 3d at 467;* see also *Busch, 169 Ill. 2d at 335* (federal preemption can be evidenced "by express provision, by implication, or by a conflict between federal and state law" (emphasis added)).

Second, plaintiff argues that preemption does not apply because there have been no standards prescribed

for the performance of cellular portable telephones [**12] and, therefore, there can be no conflict between federal and state law. The Verb court expressly found:

> "It is irrelevant whether the FDA has not set any standards, as plaintiffs allege, because the power to do so nonetheless resides with the FDA. Any determination by the trial court as to whether the cellular telephones are unsafe and what warnings and labels must be made would require the court to establish standards of safety and warnings, which would usurp the FDA's exclusive power to do so with respect to electronic products that emit radiation." *Verb, 284 Ill. App. 3d at 469.*

The absence of an affirmative regulation by an agency that is authorized to make such regulations does not discharge its power to do so and does not extinguish Congress' intent to relegate the authority to a federal agency to enact, where appropriate and approved, uniform national standards. See *Ray v. Atlantic Richfield Co., 435 U.S. 151, 178, 55 L. Ed. 2d 179, 201, 98 S. Ct. 988, 1004 (1978);* cf. *Freightliner Corp. v. Myrick, 514 U.S. 280, 286, 131 L. Ed. 2d 385, 392, 115 S. Ct. 1483, 1487 (1995)* (the applicable federal agency did not have "all authority over the regulated area" under [**13] a different statute). Moreover, as previously stated, the United States Supreme Court has recognized three ways in which preemption of state law may arise: "by express provision, by implication, or by a conflict between federal and state law." (Emphasis added.) *New York State Conference of Blue Cross & Blue Shield Plans, 514 U.S. at 654, 131 L. Ed. 2d at 704, 115 S. Ct. at 1676.* Therefore, the lack of an actual conflict between federal and state law does not necessarily determine whether preemption applies.

Third, plaintiff argues that the Act does not preempt his state law claims, relying on *Medtronic, Inc. v. Lohr, 518 U.S. 470, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996).* The Verb court discussed and distinguished the Lohr case. *Verb, 284 Ill. App. 3d at 470.* The Lohr [*1106] court held that the plaintiffs' state claims, which were based on the defendant's manufacture of a pacemaker that failed and caused injuries to the recipient of the pacemaker, were not preempted by the federal Medical Device Amendments of 1976 (MDA) (*21 U.S.C. § 360* (1994)). The Verb court held that "Lohr is distinguishable from the present case not only because it involved a statute [**14] different from the one here, but more important because plaintiffs here did not allege a present personal injury." *Verb, 284 Ill. App. 3d at 470.*

Fourth, plaintiff criticizes the Verb court for only discussing Lohr and not addressing "most of Plaintiff's authority dealing with construction of similar statutes." The Verb court correctly noted that "the key inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. The doctrine requires courts to examine the Federal statute in question to determine whether Congress intended it to supplant State laws on the same subject." (Emphasis added.) *Verb, 284 Ill. App. 3d at 467-68.* The Supreme Court in Lohr emphasized that to analyze preemption, courts must consider the language of the statute, the statutory framework surrounding it, the structure and purpose of the statute as a whole, and "the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Lohr, 518 U.S. at 486, 135 L. Ed. 2d at 716, 116 S. Ct. at 2250-51.* Obviously different statutes,

different preemption provisions and different [**15] regulations will be interpreted differently. E.g., *Orman, 179 Ill. 2d 282, 227 Ill. Dec. 927, 688 N.E.2d 620* (class actions alleging state law claims were preempted by the federal Securities Exchange Act of 1934 *(15 U.S.C. § 78a* et seq. (1994))); *Busch, 169 Ill. 2d 325, 214 Ill. Dec. 831, 662 N.E.2d 397* (common law claims were preempted by the Federal Hazardous Substances Act (*15 U.S.C. § 1261* et seq. (1988)), cf. *Scholtens, 173 Ill. 2d 375, 219 Ill. Dec. 490, 671 N.E.2d 657* (the federal Employee Retirement Income Security Act (*29 U.S.C. § 1144* (1982)) did not preempt state theory of recovery). Furthermore, even the same statute can require differing results as to preemption given different underlying facts. E.g., *Lohr, 518 U.S. 470, 135 L. Ed. 2d 700, 116 S. Ct. 2240* (the MDA did not preempt state claims); cf., R.F. v. Abbott Laboratories, No. A-2050-96T2 (May 7, 1998) (the MDA did preempt the plaintiffs' state claims due to FDA involvement). As noted above, the Verb court discussed the Lohr decision, the case on which plaintiff primarily relies, and distinguished it on the grounds that it involved a different statute. This court is not aware of any requirement that [**16] its decisions must include or discuss each and every case cited as authority by a party on appeal.

Fifth, plaintiff contends that state claims are allowed by a general savings clause in the Act, which declares that "the remedies provided for in this part shall be in addition to and not in substitution [*1107] for any other remedies provided by law." *21 U.S.C.A. § 360pp*(f) (West Supp. 1998). Although it did not mention the savings clause, the Verb court relied on two other provisions in the Act. The Verb court quoted the provision mandating the FDA secretary to promulgate regulations

> "for electronic products to control the emission of electronic product radiation from such products if he determines that such standards are necessary for the protection of the public health and safety. Such standards may include provisions for the testing of such products and the measurement of their electronic product radiation emissions, may require the attachment of warning signs and labels, and may require the provision of instructions for the installation, operation, and use of such products." *21 U.S.C.A. § 360kk*(a)(1) (West Supp. 1998).

The Act further includes a preemption clause: [**17]

> "Whenever any standard prescribed pursuant to section 360kk of this title with respect to an aspect of performance of an electronic product is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, any standard which is applicable to the same aspect of performance of such product and which is not identical to the Federal Standard. Nothing in this part shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a requirement with respect to emission of radiation from electronic products procured for its own use if such requirement imposes a more restrictive standard than that required to comply with the otherwise applicable Federal standard." *21 U.S.C.A. § 360ss* (West Supp. 1998).

Based on these provisions, the Verb court held that the plaintiffs' claims were preempted by the FDA. *Verb, 284 Ill. App. 3d at 468-69.* Although the Verb court did not discuss the general savings clause, the Illinois Supreme Court in Orman found that a general savings clause is not conclusive as to preemption. *Orman, 179*

Ill. 2d at 292. [**18] The Illinois Supreme Court relied on the United States Supreme Court's opinion in Freightliner in explaining that "a statutory preemption clause which preempts state laws that conflict with the federal law, but which also preserves nonconflicting state laws, does not foreclose the possibility of implied preemption." *Orman, 179 Ill. 2d at 293,* citing *Freightliner, 514 U.S. at 288-89, 131 L. Ed. 2d at 393, 115 S. Ct. at 1488.* Accordingly, the general savings clause in the Act does not necessarily preserve state claims.

We find that the Verb decision was correctly decided and addressed the legal arguments now presented by plaintiff on the preemption issue. Accordingly, we affirm the dismissal of plaintiff's fourth amended complaint because the state claims are preempted by federal law.

[*1108] Notwithstanding our agreement with the Verb opinion on the preemption issue, we would not find the Verb opinion to be decisive on the damage issue because, unlike the Verb complaint, the instant complaint sufficiently alleged a compensable injury based on diminished value of the product due to defects associated with the product is a compensable injury in consumer fraud [**19] and breach of warranty causes of action. Claims for diminished value of an allegedly defective product without the pleading of any damage to the product or person were allowed in *Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 221 Ill. Dec. 389, 675 N.E.2d 584 (1996),* and *Perona v. Volkswagen of America, Inc., 292 Ill. App. 3d 59, 225 Ill. Dec. 868, 684 N.E.2d 859 (1997).* Moreover, even the Verb court would have accepted such damage allegations. Most notably for the purposes of the present appeal the Verb

court held that the Verb plaintiffs failed to "allege that the telephones are defective" and "failed to plead specific facts *** that the telephones have diminished in value." *Verb, 284 Ill. App. 3d at 472.*

Paragraph 39 of the instant fourth amended complaint alleges:

> "Defendants[']] cellular portable phones were defective in that they were sold:
>
> a. Without adequate information about the health risks and the lack of information on the effects of EMF on human cells;
>
> b. Without adequate guards to shield the user from the EMF radiation;
>
> c. Without adequate instructions on how to use the phone including how to hold the phone so as to reduce exposure from EMF [**20] radiation;
>
> d. Without adequate design so as to increase the distance between the user's head and the antenna of the phone."

Regarding damages in its count for breach of implied warranty of merchantability, paragraph 43 of plaintiff's complaint states:

> "Plaintiff and members of the Class have been damaged by a reduction in the value of the cellular portable telephones, limiting the duration of their calls and usage of the cellular portable telephone, by modifying the cellular portable telephones or the use thereof to limit or mitigate their exposure to the harmful or potentially harmful radio waves, by being subjected to increased risk of exposure to potentially harmful radio waves, by failure to receive that which was bargained for."

Regarding damages in his count for statutory consumer fraud, paragraph 56 of the complaint states that "Plaintiff and Class Plaintiffs have been damaged as well by the loss of value of the phones they have purchased."

In Connick, the plaintiffs filed a class action lawsuit against car companies that manufactured the Suzuki Samurai after a consumer organization designated the Samurai as unsafe based on its excessive [*1109] risk of rolling over. In [**21] their complaint, plaintiffs alleged that the risk of rollover was due to a defect in either design or production, and stated claims for implied warranty and consumer fraud. "Significantly, plaintiffs did not allege that they had ever suffered a rollover accident in a Samurai. Rather, they sought compensation for the diminution in the vehicles' resale value due to the perceived safety risk." *Connick, 174 Ill. 2d at 489.*

The breach of warranty claim was dismissed by the supreme court in Connick, holding that the plaintiffs failed to allege sufficient notice to satisfy the notice requirement for a breach of warranty claim. *Connick, 174 Ill. 2d at 495.* The Connick court did not discuss the damage allegation for the breach of warranty claim.

The statutory consumer fraud count was reinstated but the Connick court did not discuss the damage allegation. *Connick, 174 Ill. 2d at 501-05.* The supreme court held that "we reinstate the Illinois consumer fraud count, but only insofar as it was based on the 1986 Car & Driver article or on Suzuki's concealment of material facts regarding the Samurai's safety risk." *Connick, 174 Ill. 2d at 505.* However, at least by

implication, [**22] if the damage allegation had been insufficient the supreme court would not have reinstated the claim.

In Perona, the plaintiffs filed a class action based on the alleged unintended acceleration of the Audi 5000 automobiles. Following the decision in Connick, the Perona court dismissed the breach of warranty count due to lack of notice and allowed the statutory consumer fraud count to stand. *Perona, 292 Ill. App. 3d at 64, 69.* Although the Perona court did not discuss the damage allegations in the complaint, it noted that the plaintiffs claimed that their cars lost their resale value and if the problem were not eventually remedied, their damages would be the amount of the diminution of the resale value. *Perona, 292 Ill. App. 3d at 62-63.* As in the Connick case, at least by implication, if the complaint had not sufficiently pled damages, then the Perona court would not have reinstated the consumer fraud claim.

We believe that the decisions in Connick, Perona, and Verb allow damage claims based on alleged diminished value of a product. Thus, unlike the Verb complaint, plaintiff's fourth amended complaint adequately alleged damages. [**23]

For all of the foregoing reasons, we affirm the dismissal of plaintiff's fourth amended complaint.

Affirmed.

ZWICK and QUINN, JJ., concur.

Frank J. Schiffner, etc., petitioner, v. Motorola, Inc., respondent.

No. 85976

SUPREME COURT OF ILLINOIS

1998 Ill. LEXIS 1479

October 6, 1998, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [*1] Leave to appeal, Appellate Court, First District. (1-97-2456).

JUDGES: McMorrow, J., took no part.

OPINION: Petition for leave to appeal denied.

McMorrow, J., took no part.